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No. 80-1576.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

PRINCETON UNIVERSITY AND
STATE OF NEW JERSEY,
APPELLANTS,

v.

CHRIS SCHMID,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

Motion of Massachusetts Institute of Technology for Leave to File Brief Amicus Curiae and Brief of Amicus Curiae Massachusetts Institute of Technology in Support of Appellants.

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July 13, 1981.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Motion of Massachusetts Institute of Technology for Leave to File Brief Amicus Curiae.

Pursuant to Rule 36 of the Rules of this Court, the Massachusetts Institute of Technology ("M.I.T.") respectfully moves the Court for leave to file a brief amicus curiae in the above-entitled case. Counsel for appellee Chris Schmid has given oral consent, but written consent has not been received. Upon

receipt of written consent, it will be filed with the Clerk of this Court. The appellants Princeton University and the State of New Jersey have granted their consent and copies of these consents are filed with this motion and brief.

M.I.T., like Princeton, is a private, non-profit university. The question of whether a private university has the right under the First, Fifth and Fourteenth Amendments to determine without state interference what expressive activities by strangers it will permit on its campus and under what circumstances may have a significant impact on the rights of all private universities. Moreover, M.I.T. in its brief focuses the Court's attention upon the property rights of a private university to make essential academic policy decisions regarding the access and use of its campus. M.I.T. is concerned that this Court should be aware of the important ramifications of this issue.

Conclusion.

For these reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying amicus brief in the present case in support of the position of the appellants.

Respectfully submitted,

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Brief of Amicus Curiae Massachusetts Institute of Technology in Support of Appellants.

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Interests of Amicus Curiae.[1]

The Massachusetts Institute of Technology ("M.I.T.") is a private non-profit university. It is an urban institution with a main campus located in Cambridge, Massachusetts and a research facility, Lincoln Laboratory, located in Lexington, Massachusetts.[2]

> In carrying out the provisions of its charter, [M.I.T.] has focused on two objectives, one primary and the other secondary: the advancement of knowledge through education and research, both pure and applied, in science, engineering, architecture and planning, management, social sciences, and the humanities; and service to the community and nation through the use of [M.I.T.'s] resources, both intellectual and material.

M.I.T. Policies and Procedures at 2 (September 1979). To achieve these objectives, M.I.T. provides an environment in which there are a number of opportunities for the orderly and responsible presentation of issues and points of view both inside and outside the classroom.

As an urban university, integrated by location and geography into Cambridge, M.I.T. cannot avoid some public presence on its campus. Hence, M.I.T., like Princeton University, has a substantial interest in maintaining control of the activities of strangers on its campus where they have the potential to con-

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[1] Counsel for the parties have consented to the filing of this brief. The written consents of the appellants have been filed with the Clerk of the Court pursuant to Rule 36 of the Rules of this Court. Inasmuch as written consent from the appellee has not been received, M.I.T. has filed a motion for leave to file amicus brief, as set forth *supra*.

[2] A map of the main campus is set forth in the Appendix to this brief.

flict or interfere with its objectives. To this end, it has a policy which prohibits strangers from engaging in any distribution or solicitation activities while on the campus. This policy has been consistently enforced for many years against all strangers regardless of the content of the message or the worthiness of the cause.

M.I.T. has a right to control its private property, the campus, and to prohibit the use of its property for the expressive activities of strangers. M.I.T. believes this right is protected by the U.S. Constitution. However, the decision of the Supreme Court of New Jersey has placed this right in jeopardy.

Because of the importance of this issue, not only to Princeton, but to all private universities, and for the reasons which follow, M.I.T. submits this *amicus* brief:

1) Although M.I.T. is located in Massachusetts, not New Jersey, the decision of this Court may influence other state courts in the interpretation of their state constitutions.

2) As an academic institution, M.I.T. seeks clear guidance from this Court on the permissible scope and standard of review in this case which raises issues of state judicial interference with legitimate academic interests which are protected by the First, Fifth and Fourteenth Amendments of the U.S. Constitution.

3) M.I.T. supports the positions articulated by Princeton University in its brief. However, M.I.T. believes that, in addition to First Amendment rights, universities have substantial property interests which may not constitutionally be abridged.

M.I.T. hopes that its perspective will be of assistance to the Court in treating this fundamental and serious question.

Summary of Argument.

The decision of the Supreme Court of New Jersey, restricting Princeton University's right to regulate the expressive activities of strangers on its campus, represents an unwarranted judicial intrusion into the field of educational policy-making. As such, the decision strikes at one of the most substantial element in the bundle of rights held by a private university in its campus property. A clear purpose for which property is held by a university is to foster an environment which, in the judgment of university administrators, is most conducive to a meaningful learning experience. A crucial element in maintaining that environment lies in the ability of the university to regulate access to it and to limit participation in it to those whom it selects. In addition, a significant part of the attraction of a university to potential students and faculty members lies in the educational environment and in the continuing ability of the university to structure and maintain that environment. The "right to exclude others" where they threaten to interfere with the educational purposes of the university thus constitutes an essential component of the value or utility of the university's private property.

Ordinarily, state intrusion on such an essential aspect of a private party's property rights constitutes a "taking." It is recognized, however, that in the face of a compelling countervailing interest, private property rights may be compromised. The Supreme Court of New Jersey held that appellee Schmid, and others like him, have just such a compelling countervailing interest in expressing their views to members of the Princeton community. In so doing, however, they failed to accord adequate importance to the existence of available alternative channels for the effectuation of Schmid's expression. If Schmid's interest in communicating his ideas to members of

the Princeton community may be accommodated without requiring that he be allowed to interfere with the educational environment developed and maintained by Princeton, then judicial intrusion into the right of the university to regulate the conduct of strangers within its campus boundaries is unjustified.

The right to make decisions concerning basic educational policy goes to the essence of the value of a university's property. State abridgement of that right in the name of free speech may not be justified where there exist alternative channels of communication. The action of the Supreme Court of New Jersey constituted a "taking" of a vital property interest of Princeton University without just compensation and must be reversed.

Argument.

THE RIGHT OF A PRIVATE UNIVERSITY TO THE USE AND CONTROL OF ITS CAMPUS IS UNCONSTITUTIONALLY ABRIDGED WHEN A STATE REQUIRES THAT THE CAMPUS BE USED AS A FORUM FOR THE EXPRESSIVE ACTIVITIES OF STRANGERS.

A. *The Decision of a Private University to Limit or Prohibit Expressive Activities by Strangers on its Property Serves Essential Academic Objectives.*

The objectives of M.I.T. are to educate students, to engage in research and scholarship, and to provide service to the community.[3] To further these objectives, M.I.T. has made certain

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[3] The basic goals of most universities are similar. Thus, the following description of M.I.T.'s objectives, contained in *Policies and Procedures* at 2-3 (1979), is offered as an example.

"*Education*: It is the purpose of the educational program to develop in each student that mastery of fundamentals, versatility of mind, motivation

fundamental academic policy judgments. Although one of its objectives is to educate, M.I.T. has limited the size of its student body and the number of its classes. Likewise, although another objective is to advance research and scholarship, M.I.T. does not provide instruction or opportunities for research in all areas of intellectual inquiry. Finally, although a third objective is service to the community, M.I.T. has committed its resources and property for the use primarily of its community of scholars. In a manner that M.I.T. deems to be consistent with its objectives, it accords to the public only limited rights of access and use of its campus. The public may be invited to attend specific events such as concerts or lectures, but M.I.T. extends no open-ended invitation to the public to come onto the campus or to use M.I.T. facilities at will.[4]

Because the openness of the campus makes it virtually impossible to exclude strangers from university grounds,[5] M.I.T.

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for learning, and best foundation for continuing professional achievement . . . to provide a liberal as well as professional education so that each student acquires a respect for moral values, a sense of the duties of citizenship, a feeling for taste and style, and the basic human understanding and knowledge required for leadership . . . and thereby to send forth men and women of the highest professional competence, with the breadth of learning and of character to deal constructively with the issues and opportunities of our time.

Research and Scholarship: The Institute seeks through research and reflection to extend the boundaries of knowledge and the horizons of the human intellect. In so doing, it aims to create an atmosphere of intellectual excitement, a climate of inquiry and innovation in which each student develops a consuming interest in understanding for its own sake.

Service: As a modern university and social institution, M.I.T. recognizes an inherent obligation to serve its students and alumni, the professions, the world of scholarship, and society. As part of this obligation, the Institute seeks to serve the community and nation directly through its faculty and through the use of its facilities and administrative resources whenever there is a compelling need to which it can respond without impairing its primary functions."

[4] On occasion, however, M.I.T. has held an open-house to which the general public has been invited.

[5] The campus is bisected by a major access road between Boston and Cambridge — Massachusetts Avenue. *See* Map at Appendix. Massachusetts

has had to establish certain rules regulating that public presence. Unlike Princeton, M.I.T. does not permit strangers to engage in any distribution or solicitation activities on its campus. This prohibition is an absolute one, extending to all such activities, regardless of the content of the message or the worthiness of the cause. Furthermore, M.I.T. has applied this rule consistently for many years.

M.I.T. recognizes the value of exposure to a public marketplace of ideas in which all views are expressed. For a variety of reasons, however, it does not believe that such a marketplace is the appropriate campus environment for the learning and research experiences of its community.

First, M.I.T. seeks to provide its students and faculty with the greatest possible opportunity to engage in expressive activities in an atmosphere which facilitates the orderly, rational and responsible presentation of viewpoints on a broad range of issues. The achievement of this aim requires that the limited areas of the campus suitable for expressive activities be available to the M.I.T. community without competition from a potentially large number of strangers.

The effectiveness of advocacy in any forum depends in part on the number of voices competing for attention. As this Court has said in another context, a communication medium is of little use where a "cacaphony [sic] of competing voices" exists since none of them can be "clearly and predictably heard."

Avenue is used by the walking and riding public continually throughout the day. Along the entire length of the campus overlooking the Charles River is Memorial Drive, another major thoroughfare with sidewalks for foot traffic. From east to west the campus is divided by both Vassar and Albany Streets. The part of the campus west of Massachusetts Avenue is divided by Amherst Street running east and west and by Audrey, Endicott and Danforth Streets which generally run north and south. East of Massachusetts Avenue, the campus is bordered by Main Street with Ames, Carleton and Wadsworth Streets running generally north and south and Amherst Street running east and west.

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 376 (1969). In the forum subject to its control, M.I.T. has decided to favor the expressive interests of its community over those of strangers.

Moreover, this decision does not limit the range of views expressed on the campus or the vitality of the debate. The 8,865 students, the 950 faculty members, and the 6,205 staff members at M.I.T. are sufficiently diverse in background, interests, and experience that a wide range of views is articulated.[6]

Second, the policy restricting the expressive activities of strangers may lessen the potential for disruption, harassment, and fraudulent solicitations on campus. Accordingly, it enhances M.I.T.'s ability to maintain order, safety, and security on the campus. This increased control results not only from the existence of fewer opportunities for disruption, but also from the relationship between M.I.T. and the members of its community. Inherent in this relationship is the responsibility which each member has to colleagues and peers to preserve an atmosphere conducive to the orderly exchange of ideas. In addition, the awareness that they, unlike strangers, are subject to the disciplinary power of the university may deter them from engaging in disruptive activity. Strangers have no similar responsibility or deterrent.

Third, M.I.T. is neither able, nor does it seek, to isolate its community from the views of the public. By virtue of the

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[6] For example, M.I.T. students come from every state in the United States and from 90 foreign nations; the proportion of international students at the Institute (about 18 percent) is one of the highest in an American university. The intermixing of races, ages, disciplines, and nationalities which is characteristic of M.I.T. deeply influences the life and experience of every member of this academic community. The result is an academic environment notable for its diversity of interest.

number of public ways which cross its campus, members of the M.I.T. community have ample opportunity to hear the speech and viewpoints of the public. Similarly, the public's access to members of the M.I.T. community is guaranteed since most, if not all, of M.I.T.'s students, faculty and staff must use the public ways on a daily basis.[7]

Some degree of insulation is necessary, however. As stated by the former President of the American Council of Education:

> The notion that the campus should replicate in miniature the larger community ignores the fact that a college or university is a special, rather than a general-purpose, community. Its focus is on gaining, sharing, and using knowledge. To be sure, it cannot be *isolated* from the world around it, but to function properly it must be *insulated*. Members of the academic community are not chosen at random, and the involvements of students, teachers, administrators, trustees, and others must necessarily be complementary — "unequal" if you will — for the advancement of higher learning to be accomplished (original emphasis).

L. Wilson, *Campus Freedom and Order*, 45 Denv. L.J. 502, 503 (1968).

Every university is responsible for creating an environment which permits it to effectuate its educational objectives. To

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[7] Of a total undergraduate enrollment of 4,577 students in 1980, 54.8% lived in campus dormitories (Ashdown, Baker, Bexley, Burton, East Campus, MacGregor, McCormick, New House, Random and Senior); 29.7% lived in fraternity houses located off-campus in Boston and Cambridge; and 15.5% lived off campus. Of the total graduate enrollment of 3,547 students in 1980, 70.6% lived off campus and 29.4% lived in M.I.T. housing (Ashdown, Lang, Eastgate and Westgate). Virtually all of M.I.T.'s faculty and staff live off campus. Hence, it is necessary for almost everyone in the M.I.T. community to cross Massachusetts Avenue or other public streets to get to the main classroom complex, or to and from the campus. *See* Map at Appendix.

accomplish this, however, the university must have the freedom to determine for itself what opportunities its community has for engaging in expressive activities, and to regulate the conduct of strangers who may affect the orderliness of the university's learning atmosphere. The decision to limit or to exclude from the campus the expressive activities of strangers promotes significant academic objectives without impairing the ability of the public to communicate with the university community.

B. *Because of the Academic Use and Value of a University's Property, It has the "Right to Exclude Others."*

There is no question that the Supreme Court of New Jersey has the right to interpret its state constitution to provide greater protection for expressive activities than is accorded under the First Amendment. *See PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980). However, in effectuating that right on the private property of Princeton University, the court below failed to accord sufficient weight to the university's federal property rights.

Where a university makes the academic policy decision to limit or prohibit the expressive activities of strangers on the campus, or where strangers have adequate alternative means of communication on public property, no intrusion on the university's federal property rights should be allowed. The protection accorded to a private university includes the "right to exclude" others from its campus. *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-180 (1979).

In *PruneYard*, this Court upheld the right of the public to engage in expressive activities on the premises of a privately owned shopping center. The shopping center had argued that the state court's decision amounted to an unconstitutional violation of its property interests under the Fifth and Four-

teenth Amendments. In rejecting this contention, this Court found that the shopping center had "failed to demonstrate that the 'right to exclude others' [was] so essential to the use or economic value of [its] property that the state-authorized limitation of it amounted to a 'taking.'" *PruneYard*, *supra*, 447 U.S. at 84.

PruneYard is easily distinguished on its facts from the instant case. Shopping centers are unique creatures of modern society. To a large extent, they have usurped the role of traditional downtown shopping districts. A shopping center is a large commercial enterprise. The open invitation to the general public is an integral and essential aspect of its existence. It is thus understandable that a shopping center is required to accommodate the expressive activities of the public.

By contrast, use of university facilities is limited to members of the university community for the reasons and purposes set forth above, *supra* at 4-9. The value of the academic enterprise lies in its ability to provide to its community an environment conducive to the free exchange of ideas.

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting from a statement made at a conference held by the Universities of Cape Town and Witwatersrand). Where a state court intrudes on the right of an academic institution to make essential judgments about the

"atmosphere" of the campus, an unjustified "taking" occurs. It invades the sphere of autonomy reserved to all private universities to make decisions regarding fundamental academic policies.[8] This intrusion is constitutionally impermissible.

The "taking" of Princeton's property rights is particularly unjustified because adequate alternative means of communication exist. Consideration of alternative available channels of communication is essential in striking the proper balance between federal property rights and state expressive rights. If adequate alternative channels exist, the state has no basis for requiring federal property rights to yield. As this Court noted in *Lloyd Corp., Ltd.* v. *Tanner*, 407 U.S. 551, 567 (1972):

> It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech.

This Court traditionally has looked to the existence of alternative channels in resolving conflicts between strangers' expressive rights and employers' property rights in cases arising under the National Labor Relations Act ("NLRA"). *See NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 545 (1972).[9]

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[8] This Court, in the past, has noted that a great deal of deference toward academic policies is appropriate. *See, e.g., Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978) (academic dismissal policies); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978) (admissions policies).

[9] Although these cases were decided under the NLRA, the issues raised are clearly analogous to the instant case. This Court found expressive rights in

This Court's decision in *PruneYard* did not reject the value of looking at alternative channels of communication. However, in the total factual context of a very large shopping center open to the general public, it appears to have found that the available channels could not, standing alone, defeat the state's interest in the promotion of expressive activity.[10]

At trial, Princeton established that there were numerous alternative channels of communication off campus. However, the Supreme Court of New Jersey failed to give sufficient weight to Princeton's federal property rights in light of the availability of alternative channels of communication. It stated:

> [t]he owner of such private property, therefore, is entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property. It is at this level of analysis — assessing the reasonableness of such restrictions — that weight may be given to whether there exist convenient and feasible alternative means to individuals to engage in substantially the same expressional activity.

Babcock & Wilcox when it stated that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Thus, statutorily protected expressive rights had to be balanced against the private property rights of employers. In the instant case, the rights accorded by the state constitution should also be balanced and an accommodation struck without unnecessary infringement of Princeton's property rights.

[10] *See PruneYard*, *supra*, 447 U.S. at 94 (Marshall, J., concurring) ("The California Supreme Court's decision is limited to shopping centers, which are already open to the general public"); 447 U.S. at 96 (Powell, J., concurring in part) ("Significantly different questions would be presented if a State authorized strangers to picket or distribute leaflets in privately owned, free-standing stores and commercial premises. Nor does our decision today apply to all 'shopping centers'").

> While the presence of such alternatives will not eliminate the constitutional duty, it may lighten the obligations upon the private property owner to accommodate the expressional rights of others and may also serve to condition the content of any regulations governing the time, place, and manner for the exercise of such expressional rights.

Appellants' Jurisdictional Statement at 27a-28a.

By considering alternative channels of communication only for the purposes of regulating the time, place, and manner of communications by strangers, the Supreme Court of New Jersey has misconstrued the importance of such alternative channels in the balancing of interests. It is the right of the state's judiciary to determine that the common interest of the public in free expression requires that private property interests give way to some extent. However, such a determination is unwarranted where that same interest may be served without resort to so intrusive a means.

The "business" of the University is education. In pursuit of its academic objectives, a private University has a property interest in creating a forum for the exchange of ideas between members of the University community. If no alternative channels of communication were available to the public, then the state arguably could require Princeton to accommodate the speech interests of the public. But such channels were available at Princeton, as they are at M.I.T. The decision below, therefore, represents a needless public usurpation of Princeton's property rights.

Thus, it is clear that Princeton had the right to exclude or limit the expressive activities of strangers on its campus. Abridgement of this right by the Supreme Court of New Jersey constitutes an unwarranted "taking." Further, the abridgement of this right was unnecessary to achieve the avowed state purpose of enhancing speech because there were adequate alternative channels of communication.

Conclusion.

For the reasons set forth above, this Court should reverse the judgment of the court below.

Respectfully submitted,

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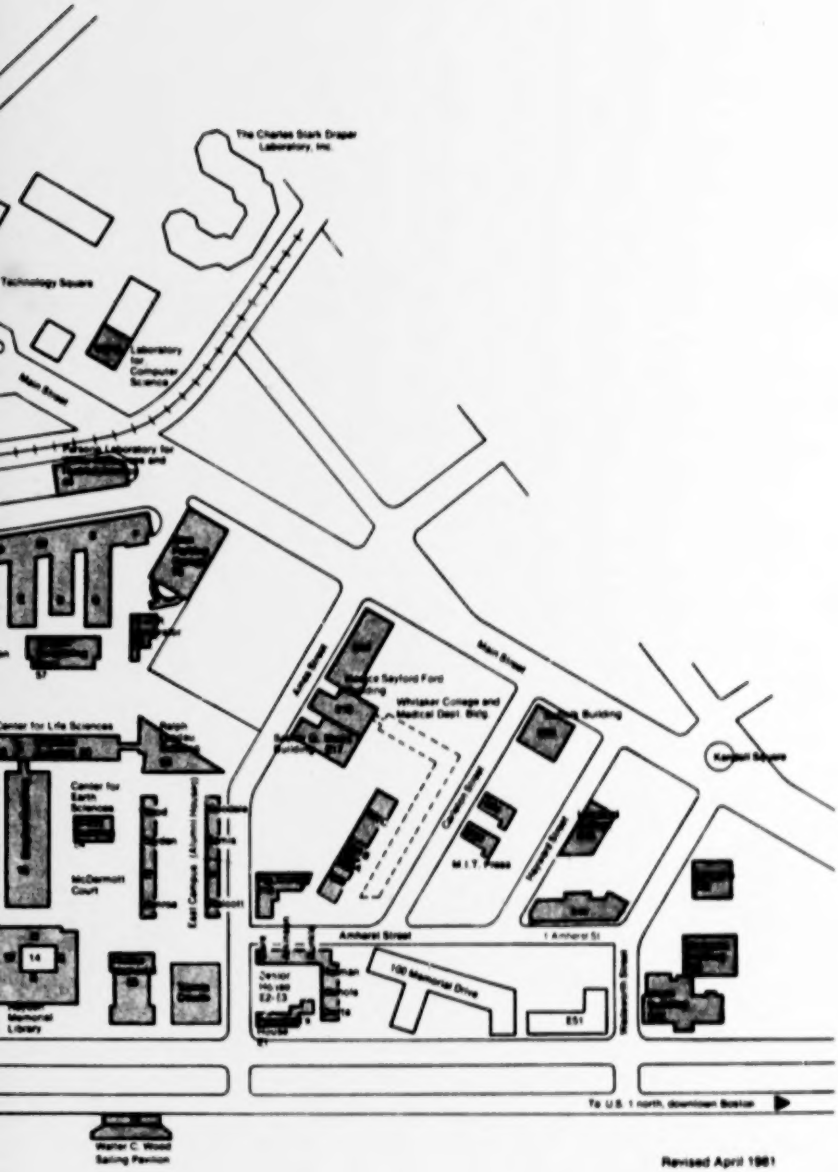
July 13, 1981.

East Campus



Revised April 1981

The numbers on this map refer to M.I.T.'s building numbers. Under this numbering system, a single room number serves to completely identify any location on the campus. In a typical room number, such as 7-111, the figure(s) preceding the hyphen give the building number; the first number following the hyphen, the floor; and the last two numbers the room. Thus Room 7-111 is in Building 7, on the first floor; Room 7-311 is directly above it, on the third floor.

It is useful to know that buildings on the main campus east of the Great Dome (Building 10) have even numbers and those west of it have odd numbers. Don't expect to find Building 6, for instance, next to Building 5.

Buildings west of Massachusetts Avenue are designated W, those north of the Conrail tracks N, those east of Ames Street E, and those north of the railroad and west of Massachusetts Avenue NW.

West Campus